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' MOTION TO REMOVE THE "PROTECTED INFORMATION" DESIGNATION FROM DEFENDANT'S PROVISIONAL PRIVILEGE LOGS

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DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION TO REMOVE THE "PROTECTED INFORMATION" DESIGNATION FROM DEFENDANT'S PROVISIONAL PRIVILEGE LOGS

The Court should deny the motion by Fairholme Funds, Inc. (Fairholme) to remove the "Protected Information" designation from provisional privilege logs produced by the United States.[1] The provisional privilege logs contain confidential information meeting the definition of "Protected Information" under the protective order. Moreover, the provisional logs represent the Government's preliminary judgments about privilege claims and were provided to plaintiffs as an accommodation and in the interests of expediting the discovery process. The logs have changed from week to week as the Government continues reviewing documents initially identified as potentially privileged. Thus, many of the entries are now obsolete and inaccurate.

Fairholme cannot articulate any legitimate, litigation-related rationale for the relief it seeks where (1) Fairholme counsel has access to the provisional logs under the protective order, and (2) the Government intends to produce a public version of the final privilege log. There is no legitimate justification or proper purpose for permitting Fairholme to publicize provisional logs containing preliminary and now obsolete information. For these reasons, Fairholme's motion is not only without merit, but is also a waste of the Court's and the parties' time.

[1] Fairholme identifies the March 20, 2015 provisional log in its motion, but states that it expects the Court's ruling to apply to subsequent provisional logs. Pls. Mot. at 2 n.2.

BACKGROUND

After the Government filed its motion to dismiss Fairholme's complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the Court of Federal Claims (RCFC), Fairholme requested limited, jurisdictional discovery regarding three issues for the purpose of responding to the Government's motion. The Court granted Fairholme's request. To date, the Government has produced over 600,000 pages of documents, and the parties have completed two depositions.

To facilitate the production of documents, the Court issued a protective order on July 16, 2014. Prot. Order (July 16, 2014), ECF No. 73. The protective order defines "Protected Information" to include any "proprietary, confidential, trade secret, or market-sensitive information, as well as information that is otherwise protected from public disclosure under applicable law." *Id.* ¶ 2. The protective order also incorporates a process for a receiving party to challenge the designation of materials as "Protected Information." Significantly, the receiving party bears the burden of showing that the designation was improper. *Id.* ¶ 17.

Separately, as part of the Government's rolling document production, Fairholme requested that the Government provide provisional privilege logs on a periodic basis. Although the Court's rules do not contemplate provisional privilege logs, we agreed to Fairholme's request as a means of providing Fairholme information as quickly as possible while preserving the Government's right to reassess its privilege designations as discovery progresses. The Government has continued its document review, revisited its initial privilege designations with the relevant agencies, revised our provisional logs, and released documents accordingly. *See* Pls. Mot. at 6-7. Fairholme correctly states that we have provided six provisional privilege logs pursuant to this arrangement. *Id.* The production of provisional logs will culminate in the production of a final privilege log in accordance with RCFC 26(b)(5)(A).

Implicit in the arrangement with Fairholme was an understanding that the production of provisional privilege logs was solely for Fairholme's convenience and to facilitate the parties' discussions regarding privilege disputes. Although the initial provisional privilege logs provided to Fairholme did not bear the "Protected Information" legend, the parties understood that the Government's assertions were preliminary and subject to change pending the preparation of a final privilege log after document production is complete. Nonetheless, Fairholme published portions of the Government's provisional privilege logs in its letter to shareholders. *See* Ex. 1 (Fairholme Capital Management, L.L.C., Portfolio Manager's Report For the Year Ended December 31, 2014 (Jan. 28, 2015)).

As a result of ongoing review, a number of privilege assertions have been withdrawn or modified. The Government's document production is nearing completion, and we intend to provide Fairholme a non-protected version of the final privilege log when complete.

ARGUMENT

It is important at the outset to emphasize the obvious point that Fairholme's counsel has all the provisional privilege logs; the Government has withheld no information from counsel and other persons with access under the protective order. Thus, Fairholme cannot identify any actual prejudice in its motion. Rather, Fairholme's motion merely concerns the academic questions of whether provisional privilege logs may be designated as "Protected Information," and whether Fairholme has met its burden to show disclosure of the logs should otherwise be allowed.

I. Confidential Information In The Provisional Privilege Logs Is "Protected Information" Under The Protective Order

Because the provisional privilege logs contain confidential information, Fairholme has not established that the logs have been improperly designated under the protective order, or that disclosure otherwise should be allowed.

Pursuant to Paragraph 17 of the protective order, Fairholme must show that the provisional privilege logs are "improperly designated or that disclosure [should be] allowed." Prot. Order ¶ 17; *see also* Tr. Of Status Conf. (July 16, 2014) at 17-18. In its motion, however, Fairholme attempts to reverse this standard, insisting that the Government is required to demonstrate that the provisional logs qualify for protection under the protective order. Pls. Mot. at 9 ("None of the information in the March 20 Log even remotely qualifies as protected under the Court's order, and the Government has not even attempted to demonstrate that it does"). But the burden rests on Fairholme, and it cannot meet that burden.

A. The Provisional Privilege Logs Contain Confidential Information

Fairholme insists that the provisional privilege log does not constitute confidential information, but fails to explain why this is the case. The inclusion of the term "confidential" in the definition of Protected Information was a subject of disagreement between the parties during the negotiation of the protective order and was addressed at the July 16, 2014 status conference. Fairholme counsel contended that confidential information should be excluded from the definition of "Protected Information," stating that "[b]lanket and general allegations of confidentiality are not sufficient under the rule." July 16, 2014 Tr. at 9:2-3. Significantly, the Court rejected Fairholme's contention and issued a protective order that included "confidential" information within the definition of "Protected Information." Prot. Order ¶ 2.

The information contained in the privilege logs meets the ordinary definition of "confidential information." Confidential information means "[k]nowledge or facts not in the public domain but known to some." Black's Law Dictionary (10th ed. 2014). The provisional privilege logs reflect Government counsel's preliminary, confidential decisions on what documents may be privileged. In normal discovery, preliminary information such as this never enters the "public domain." Indeed, it was only made available to plaintiffs in an effort to

compromise and to grant one of their requests. Further, the logs contain information that was sent internally among agency employees, and information that was neither shared nor intended to be shared with the public.[2] The logs contain confidential information and were properly designated as "Protected Information" under the protective order.

Fairholme asks the Court to limit "Protected Information" to "sensitive" information whose disclosure would cause "real competitive harm" or "market-distorting effects." Pls. Mot. at 8. Fairholme's argument, if adopted, would render the word "confidential" superfluous, because the definition of "Protected Information" *already* includes information that is "proprietary" or "market-sensitive." Prot. Order ¶ 2. The separate term "confidential" in the definition, therefore, must mean something distinct from "proprietary" and "market-sensitive."

B. Production Of Initial Privilege Logs Without A "Protected Information" Designation Does Not Waive The Government's Right To Designate Subsequent Provisional Logs As "Protected Information"

Fairholme suggests that the Court should find that the Government's earlier production of unprotected provisional privilege logs operates as a waiver as to all future provisional privilege logs. Pls. Mot. at 8.[3] This argument is flawed because it conflicts with the terms of the protective order, which states that a waiver under the protective order "shall not operate as or be used to argue for a waiver with respect to any other documents." Prot. Order ¶ 15.

Accordingly, even if the production of the initial provisional privilege logs without a "Protected Information" designation waived confidentiality protection as to those logs, that

[2] Among other things, the log contains the names of the individuals (including career agency employees) who sent and received the documents listed on the log, the employees' email addresses, and the subjects of the communications.

[3] The Government did not designate its first three provisional logs as "protected" because it did not expect Fairholme would disclose the information publicly.

would not have waived protection as to the provisional privilege logs at issue here. The Court should, therefore, reject Fairholme's waiver argument.

C. The Cases Cited By Fairholme Do Not Show That The Provisional Privilege Logs Were Improperly Designated Or That Disclosure Should Be Allowed

None of the authorities on which Fairholme relies supports the relief it seeks. Fairholme primarily relies on *In re Violation of Rule 28(d)*, 635 F.3d 1352, 1357-58 (Fed. Cir. 2011). Pls. Mot. at 2, 10. *Violation of Rule 28(d)*, however, is inapplicable here.

In *Violation of Rule 28(d)*, the court of appeals sanctioned counsel for the defendant drug manufacturers who had over-designated appellate briefing material as protected under a lower-court protective order. In particular, the court of appeals questioned whether "case citations, direct quotations from published opinions of the cases cited, and legal arguments" could qualify as confidential under the lower court's protective order. *Id.* at 1355-56. The court's concerns in *Violation of Rule 28(d)*, however, were focused on judicial records – including the legal arguments in appellate briefs – not documents produced and exchanged with an opposing party during the course of discovery.

Indeed, although the court of appeals noted that "[t]here is a strong presumption in favor of a common law right of public access to court proceedings," it did not address any right by the public to access discovery materials, much less a provisional privilege log. *Id.* at 1356. The holding does not undercut the Government's designation of provisional privilege logs as "Protected Information."

The other cases Fairholme cites are inapplicable because they concern the meaning of "confidential" when considering whether to disqualify experts who may have received confidential or proprietary information from an opposing party during the course of a previous relationship. Pls. Mot. at 10 & n.6; *see also Return Mail, Inc. v. United States*, 107 Fed. Cl. 459,

468-69 (2012) (denying defendant's motion to disqualify expert witness in patent litigation when "defendant has not established that relevant confidential, proprietary or privileged disclosures were made to [the proposed expert], or that he was privy to confidential or privileged attorney/client discussions"); *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1098 (N.D. Cal. 2004) (denying defendant's motion to disqualify expert witness in patent litigation when defendant had not shown that any confidential information had been disclosed to the proposed expert). These cases do not support the relief Fairholme seeks.

Fairholme asks the Court to find that in order for information to be confidential, the release of the information "must be likely to cause some type of legally cognizable harm to the producing party or third parties." Pls. Mot. at 10. There is no basis in the protective order or relevant case law for such a restrictive definition, which conflicts with the ordinary meaning of "confidential" cited above. The cases relied upon by Fairholme relate to a party's request to limit discovery, not the mere designation of protected information produced in discovery. *Id.* None of the cases Fairholme cites concern the propriety of designating a provisional privilege log or other discovery materials as "Protected Information" under a protective order.

II. In The Absence Of Litigation-Related Prejudice, Fairholme Has Not Met Its Burden To Show That Disclosure Of The Provisional Privilege Logs Should Be Allowed

Fairholme has articulated no legitimate litigation prejudice to it resulting from the Government's designation of the provisional privilege logs. Fairholme's counsel has full access to the logs, as do Fairholme's experts. Designation of the provisional privilege log as "Protected Information" will not affect Fairholme's ability to respond to our motion to dismiss and does not undermine the purpose of allowing jurisdictional discovery in this case, particularly when the Government will produce a public version of the final log. Instead, Fairholme states that its motion is based on its desire to share the logs with: (1) its client; (2) counsel for other plaintiffs

in other litigation; and (3) non-litigants who might take an interest. Pls. Mot. at 12-13. These rationales do not withstand scrutiny. No court has held that these reasons constitute sufficient need to overcome a party's designation of documents as protected. More importantly, the Government intends to provide Fairholme a public, non-designated version of its final privilege log that likely will render Fairholme's motion moot.

First, Fairholme has no litigation need to share the provisional logs with its client. Fairholme claims that designating the logs as protected "prevents Fairholme's counsel from fully consulting their clients about important questions of legal strategy." Pls. Mot. at 12. But Fairholme does not explain why the clients must see provisional logs to participate in discussions regarding legal strategy.

The second rationale, the desire to share the provisional log with counsel in other cases, likewise lacks merit. Fairholme has not explained why it needs the assistance of outside counsel to evaluate the Government's privilege assertions, or stated that the inability to share the provisional log with outside counsel will inhibit Fairholme counsel's ability to represent its client. Moreover, if the designation is truly affecting Fairholme's progress by limiting its discussions with counsel in other cases, Fairholme can move the Court for permission to provide the provisional logs to those counsel.

The third rationale has nothing to do with the litigation at all: Fairholme desires to share the provisional privilege logs with persons who Fairholme believes might "take an interest" in the Government's assertion of privilege. This basis makes no sense where the *provisional* logs contain obsolete information. The logs only reflect Government counsel's initial determinations of what documents may be privileged. Fairholme's desire to make public use of the provisional

logs appears intended to mislead the public by presenting preliminary decisions as the Government's ultimate positions. This basis cannot support the pending motion.

Fairholme's previous use of the provisional logs illustrates the improper motive underlying its motion. On January 28, 2015, Fairholme's chief executive published a letter to Fairholme Fund investors containing verbatim excerpts from the Government's earlier provisional logs. Fairholme offers no explanation how providing provisional logs to Fairholme's investors has any role in this litigation. Certainly, courts view unfavorably a party's use of protected information for its own commercial gain, even when that information – unlike here – has become part of the judicial record. The Supreme Court has stated that "[i]t is uncontested . . . that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Nixon v. Warner Comm'cns, Inc.*, 435 U.S. 589, 598 (1978) (internal citations omitted). Subsequent courts have repeated the sentiment that litigation materials should not be used for private commercial purposes. *See In re Knight Pub. Co.*, 743 F.2d 231, 235 (4th Cir. 1984) ("The Supreme Court has suggested that the factors to be weighed in the balancing test include whether the records are sought for improper purposes, such as promoting public scandals or unfairly gaining a business advantage . . . ."); *Newman v. Graddick*, 696 F.2d 796, 803 (11th Cir. 1983) ("[D]istrict courts [should] look to whether the records are sought for such illegitimate purposes as to promote public scandal or gain unfair commercial advantage . . . ."). The Court should not sanction Fairholme's use of provisional privilege logs in this manner.

Further, Fairholme alludes to "public access" and unidentified third parties' "constitutional rights" to access as grounds for requiring the de-designation of the provisional

privilege log. Pls. Mot. at 11-12. But the cases Fairholme cites merely stand for the unremarkable proposition that a party must have good cause to obtain a Rule 26 protective order. *Id*. at 12-13 (citing *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999) (remanding to district court judge to determine whether parties may file appendix under seal because lower court judge "fail[ed] to make a determination, as the law requires, of good cause to seal any portion of the record" prior to issuing a stipulated protective order); *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 860 (7th Cir. 1994) (reversing lower court's imposition of sanctions against party that violated stipulated protective order because lower court had ratified stipulated order without undertaking an independent examination to determine whether good cause existed to grant it); *Lakeland Partners, LLC v. United States*, 88 Fed. Cl. 124, 137-39 (2009) (denying motion for protective order where the moving party had not met its burden of showing good cause under Rule 26)).

Fairholme's motion has nothing to do with a Rule 26 protective order. The Government has not sought a protective order to avoid producing a privilege log, but only seeks to produce a provisional log with a protected designation. The Court already found good cause for the designation of "Protected Information" when it issued the protective order. The parties actively negotiated the terms of the protective order, and the subjects on which the parties disagreed were addressed in a status report and a hearing. *See* Pls. Mot. at A163. Ultimately, the Court issued the protective order in this case, allowing the parties, in these very circumstances, to designate discovery materials as Protected Information.[4]

[4] In a footnote, Fairholme mischaracterizes the applicability of the Freedom of Information Act (FOIA) to the protective order. Pls. Mot. at 10-11 n.7. Fairholme asserts that the provisional privilege log should not be "Protected Information" because "Vaughn indexes" produced in response to FOIA requests are typically made public. *Id.* Fairholme's argument is misplaced.

Finally, the Court should decline Fairholme's request for an order instructing the Government to prepare additional public and non-public versions of provisional privilege logs with confidential information redacted for Fairholme counsel to share with members of the public as it sees fit. Pls. Mot. at 13-14. This request serves no purpose other than to further delay discovery. As Fairholme notes, the Government has provisionally identified thousands of documents as potentially privileged. Moreover, we are in the process of: (1) reviewing those documents to evaluate the preliminary privilege assertion; (2) producing those documents that were provisionally withheld but deemed to be not privileged; (3) producing redacted versions of documents that contain non-privileged information; and (4) preparing a final privilege log in accordance with RCFC 26(b)(5). This multi-part effort requires the full-time attention of a team of Government attorneys in consultation with agency counsel. The Government has devoted significant resources to completing these tasks, while at the same time preparing for several depositions on a schedule dictated by Fairholme.

To demand that the Government individually redact thousands of entries containing various personal information and descriptions of subject matter from these provisional logs would greatly hinder the Government's ability to complete its final privilege log in a timely manner, and would frustrate the Court's and the parties' interests in timely completing

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During the hearing on the protective order, the Court rejected Fairholme's attempt to carve out a FOIA exception to protection from third party disclosure under the protective order:

> THE COURT: No, we're not doing that. In fact, the applicable law appears in the protective order that you'll be seeing, but FOIA was not included. If [plaintiffs are] entitled to receive documents under law, they're going to get it. . . . We're talking about the applicable law of this Court. I mean, and, obviously, we're not talking about every statute on the books."

July 16, 2014 Tr. at 41:4-42:16 (Pls. Mot. at A179)).

jurisdictional discovery. This is especially true given that Fairholme will receive a final privilege log that is not designated as "Protected Information."

CONCLUSION

For these reasons, the Government respectfully requests the Court deny Fairholme's motion.

Respectfully submitted,

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