

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

DEFENDANT’S MOTION FOR LEAVE TO FILE SUR-REPLY

Defendant, the United States, respectfully requests leave to file the attached sur-reply to plaintiffs’ May 27, 2015 reply in support of their motion challenging the designation of the Government’s provisional privilege logs as “Protected Information.” A sur-reply is necessary to clarify the Government’s position that it will provide plaintiffs a public, non-protected version of the final privilege logs, with no redacted columns, upon completion of the final logs. In fact, we have already done so with respect to the final privilege log from the Federal Housing Finance Agency.

This clarification is necessary given plaintiffs’ speculation that the Government’s final privilege logs might contain wholesale redactions or redacted columns. Pls. Reply at 2. The clarification is also necessary to respond to plaintiffs’ accusation that such redactions are part of a broad “strategy” to prevent public disclosure of information relating to the allegations in plaintiffs’ complaint. *Id.*

A request to file a sur-reply is normally granted “when a party is ‘unable to contest matters presented to the court for the first time’ in the last scheduled pleading.” *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003) (quoting *Lewis v. Rumsfeld*, 154 F. Supp. 2d

56, 61 (D.D.C. 2001)); accord *United States v. Diabetes Treatment Centers of America, Inc.*, 238 F. Supp. 2d 270, 276-77 (D.D.C. 2002).

For these reasons, the United States respectfully requests that the attached sur-reply be filed to permit clarification of our position with respect to the final privilege logs.

Respectfully submitted,

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s/ Robert E. Kirschman, Jr.
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**DEFENDANT’S SUR-REPLY IN RESPONSE TO PLAINTIFFS’
MOTION TO REMOVE THE “PROTECTED INFORMATION”
DESIGNATION FROM DEFENDANT’S PROVISIONAL PRIVILEGE LOGS**

Defendant, the United States, respectfully files this sur-reply in support of its response to the motion by Fairholme Funds, Inc., *et al.* (Fairholme) challenging the designation of the Government’s provisional privilege logs as “Protected Information.” Although we disagree with virtually all of the assertions in Fairholme’s reply, we respond to only two here.

We demonstrated in our response that Fairholme’s motion addressing the *provisional* privilege logs was largely a waste of the Court’s time because the United States intended to produce *final* privilege logs that would not be designated “Protected Information.” Def. Resp. at 1, 3. In its reply, Fairholme dismisses our argument, claiming that final, non-protected privilege logs might be inadequate because these logs might have large-scale redactions. Pls. Reply at 2. Fairholme further claims that these potential redactions would be part of what it calls a Government “strategy” to prevent disclosure of information related to the subject of Fairholme’s suit: the Third Amendment to funding agreements between the Department of the Treasury (Treasury) and the Federal Housing Finance Agency (FHFA). *Id.*

Given the statements in Fairholme’s reply, we clarify here that we intend to provide public, non-protected, final privilege logs, with no large-scale redactions or redacted columns.

In fact, we have already provided plaintiffs a final, unprotected FHFA privilege log with no redactions at all. Although we have communicated this information and provided this log to Fairholme, Fairholme has not agreed to withdraw its motion.

We also feel compelled to respond to Fairholme's accusation of a broad Government "strategy" to avoid disclosure of information related to the Third Amendment. Fairholme's accusation that the Government is preventing disclosure of information is simply wrong.¹ At this time, the Government has produced over 600,000 pages of Treasury and FHFA documents in response to Fairholme's document requests. Fairholme has also taken exhaustive depositions of key FHFA officials related to the Third Amendment, and has noticed the depositions of present and former Treasury officials.

For these reasons, and the reasons explained in our response to Fairholme's motion, the United States respectfully requests that the Court deny Fairholme's motion.

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

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ROBERT E. KIRSCHMAN, JR.
Director

¹ Fairholme's reference to the number of documents on our protected logs, Pls. Reply at 4 n.3, is a breach of the Court's protective order; the only way that Fairholme could make the statement is because it has access to our protected logs. Beyond this, Fairholme's statement that we have withdrawn privilege over only a small number of documents is inaccurate.

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