

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFFS’ MOTION FOR LEAVE TO FILE SUR-REBUTTAL

Plaintiffs Fairholme Funds, Inc., et al. (“Plaintiffs” or “Fairholme”) respectfully request leave to file the attached sur-rebuttal in response to the Government’s recent sur-reply¹ concerning Fairholme’s pending motion to remove the “Protected Information” designation from certain of the Government’s so-called “provisional” privilege logs. The Court granted the Government’s motion for leave to file its sur-reply earlier today. Fairholme did not oppose the Government’s motion for leave to file the sur-reply, because the sur-reply included a welcome “clarification” of the Government’s position regarding the nature of the final privilege logs that it plans to produce.

But the sur-reply also includes an accusation by the Government that counsel for Fairholme violated this Court’s Protective Order when it filed its May 27 reply in support of its pending motion. That is a very serious accusation, and it is also utterly baseless. Given the seriousness of this false accusation, Fairholme requests an opportunity to respond in order to defend

¹ See Defendant’s Sur-Reply in Response to Plaintiffs’ Motion to Remove the “Protected Information” Designation from Defendant’s Provisional Privilege Logs (June 1, 2015) (Doc. 157-1) (“Sur-Reply”).

itself. In addition, because the Government made a number of other representations in the sur-reply that, if not corrected, will mislead the Court regarding the events that led up to the filing of the sur-reply, Fairholme also requests an opportunity to correct the record on these points as well. While Fairholme has no desire to unnecessarily prolong the briefing on its pending motion, good cause exists for the filing of the attached sur-rebuttal, as Fairholme obviously had no prior opportunity to respond to the accusations and other representations made by the Government in its sur-reply.

For the foregoing reasons, Fairholme respectfully requests leave to file the attached sur-rebuttal.

Date: June 2, 2015

Respectfully submitted,

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**PLAINTIFFS’ SUR-REBUTTAL IN RESPONSE TO
DEFENDANT’S JUNE 1 SUR-REPLY**

Plaintiffs Fairholme Funds, Inc., et al. (“Plaintiffs” or “Fairholme”) respectfully submit this short sur-rebuttal, in response to the Government’s recent sur-reply¹ concerning Fairholme’s pending motion to remove the “Protected Information” designation from certain of the Government’s so-called “provisional” privilege logs. The ostensible reason for the filing of the Government’s sur-reply was to provide a “clarification” of statements it made, in its recent opposition² to Fairholme’s motion, regarding its intent to produce public “version[s]” of its “final” privilege logs. The clarification provided by the Government is that it now intends to produce public versions of its “final” logs with no “large-scale redactions or redacted columns.” Sur-Reply at 1.

The Government’s “clarification” of its position, as discussed below, is in fact a welcome *change* in its position rather than a true clarification, and for that reason Fairholme did not plan

¹ See Defendant’s Sur-Reply in Response to Plaintiffs’ Motion to Remove the “Protected Information” Designation from Defendant’s Provisional Privilege Logs at 1 (June 1, 2015) (Doc. 157-1) (“Sur-Reply”).

² See Defendant’s Response to Plaintiffs’ Motion to Remove the “Protected Information” Designation from Defendant’s Provisional Privilege Logs at 1, 3, 8 (May 18, 2015) (Doc. 154) (“Response” or “Resp.”).

to oppose the Government's motion for leave to submit its sur-reply. Nonetheless, because the Government's sur-reply contains a false accusation that counsel for Fairholme has violated this Court's Protective Order, and because the Government made a number of other representations in the sur-reply that, if not corrected, will mislead the Court, Fairholme is compelled to file this short sur-rebuttal in order to defend itself against the Government's accusations and to correct the record.

1. The Government claims that the statement, in a footnote in our reply brief, that “[t]o date, the Government has asserted privilege with respect to thousands of documents,”³ constitutes “a breach of the Court’s protective order.” Sur-Reply at 2 n.1. The Government claims that this simple statement of fact constitutes Protected Information within the meaning of the Protective Order and that we, therefore, violated that order by including the statement in a reply brief that was not filed under seal. The notion that this statement constitutes “confidential” information within the meaning of the Protective Order is, as a matter of law, ludicrous on its face.⁴ But the Government’s claim is also baseless as a matter of fact, for the information at issue is already in the public domain. Not only has the fact that “the Government has asserted privilege with respect to thousands of documents” been publicly disclosed multiple times in this litigation, it has been publicly disclosed *by the Government*.

Thus, in its own *publicly-filed* opposition to Fairholme’s pending motion, the Government specifically acknowledged that “[a]s Fairholme notes, the Government has provisionally

³ Plaintiffs’ Reply in Support of their Motion to Remove the “Protected Information” Designation from Defendant’s March 20 Privilege Log at 4 n.3 (May 27, 2015) (Doc. 155) (“Reply”).

⁴ As we discuss at length in our motion papers, this Court specifically rejected the Government’s definition of “confidential” as any information not already in the public domain, and it has made clear that for information to be considered confidential, its public release must be likely to cause some type of legally cognizable harm. *See, e.g.*, Reply at 7–10.

identified *thousands* of documents as potentially privileged.” Resp. at 11 (emphasis added).

And the Government went on to contend, in that same *public* filing, that

[t]o demand that the Government individually redact *thousands* of [privilege log] 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 jurisdictional discovery.

Id. at 11–12 (emphasis added). Moreover, in the *publicly-filed* version of Fairholme’s opening brief, Fairholme referred, *without objection by the Government*, to the Government’s thousands of privilege assertions. On page 13 of that brief, for example, Fairholme noted the Government’s effort to “invoke various privileges to shield *thousands* of relevant documents from scrutiny.” Plaintiffs’ Public, Redacted Motion to Remove the “Protected Information” Designation from Defendant’s March 20 Privilege Log at 13 (May 12, 2015) (Doc. 152) (emphasis added). And in recounting the relevant facts relating to the Government’s production of three (to that point) protected privilege logs, we identified the approximate number of documents that were listed in each of those logs; added together, the figures discussed in the brief came out to more than 2,100 documents – i.e., thousands of documents. *Id.* at 5, 7. Importantly, before we filed the public version of our opening brief, we provided it to counsel for the Government, as contemplated by the Protective Order.⁵ See, e.g., Protective Order ¶ 11. *The Government did not object to any of these references to its assertion of privilege over “thousands” of documents.*⁶ In short, the Government’s accusation is utterly baseless, it is offensive, and it should be rebuked.

⁵ See E-mail from Vincent Colatriano to Gregg Schwind (Apr. 24, 2015) (copy attached hereto as Exhibit 1).

⁶ In addition to the numerous references in the parties’ public briefs to the Government’s “thousands” of privilege assertions, the parties had previously discussed, during public status conferences, the likelihood that the Government would assert privilege over thousands of documents. See, e.g., Transcript of Jan. 28, 2015 Status Conference at 11; Transcript of Mar. 31, 2015 Status Conference at 15. See also Transcript of Feb. 28, 2015 Status Conference at 11, 15.

2. Other statements in the sur-reply, while not nearly as serious as the Government's accusation that we have violated the Protective Order, are also distressing. In particular, the Government recounts a version of the events leading up to the filing of its "clarification" in its sur-reply that misleadingly omits material facts. The Government notes, for example, that it has "already provided plaintiffs a final, unprotected FHFA privilege log with no redactions at all," and it objects that, despite the production of the FHFA log and the Government's "clarification," "Fairholme has not agreed to withdraw its motion." Sur-Reply at 2.

But the Government does not include the following points:

- The Government first told Fairholme that its final privilege logs would not include extensive redactions on the afternoon of Friday, May 29. Prior to that time, in its response to Fairholme's motion, the Government made quite clear that it considered such information as "the names of the individuals . . . who sent and received the documents listed on the log, the employees' email addresses, and the subjects of the communications" to be confidential information. Resp. at 5 n.2. *See also id.* at 11 (arguing that it should not be required to redact confidential information such as "various personal information and descriptions of subject matter" from the provisional logs). The Government's May 29 statement that it intended to produce largely unredacted public versions of its final privilege logs is thus materially inconsistent with its prior arguments regarding the supposedly confidential information contained within its earlier privilege logs.
- In any event, in their discussions on the afternoon of May 29, counsel to Fairholme and to the Government agreed that they would both give the issue further thought over the weekend and would speak again early this week.
- However, rather than continue discussions as the Government had agreed to do, the Government, on the next business day (Monday, June 1), filed its motion for leave to file the Sur-Reply. It did so without providing any prior notice to Fairholme.
- It is true that the Government produced to Fairholme its "final" FHFA privilege log. It did so, however, without any prior notice at 3:38 p.m. on June 1. Less than 20 minutes later, at 3:56, it filed its motion for leave to file the Sur-Reply, attaching the proposed sur-reply in which it, among other things, criticized Fairholme for not withdrawing its motion in light of the final FHFA privilege log it had just received minutes earlier.
- The Government does not note in its Sur-reply that although it had previously rep-

resented, on multiple occasions, that it expected to produce all of its final privilege logs by the end of May, it informed Fairholme on May 28 that it now expected to complete its final privilege log (presumably one relating to its Treasury document productions) no earlier than the end of June.

These recent events confirm that our original motion to remove the Protected Information designation from the Government's earlier privilege logs was well-founded. As we have argued, the fact that the Government, quite consciously and intentionally, declined to designate its first three privilege logs as protected underscores that none of the logs it later produced – which contain the exact same types of information – contained Protected Information. *See, e.g.*, Reply at 11–12. The Government has now made clear that it also does not consider the “final” versions of these logs – which, again, contain the exact same types of information – to contain confidential information either. While we welcome the Government's commitment to eventually produce public versions of its final privilege logs that will not include “wholesale” redactions, doing so will not somehow cure the Government's improper and unjustified designation of numerous earlier logs as protected.

Date: June 2, 2015

Respectfully submitted,

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EXHIBIT 1

Vince Colatriano

From: Vince Colatriano
Sent: Friday, April 24, 2015 2:45 PM
To: Schwind, Gregg (CIV) (Gregg.Schwind@usdoj.gov)
Cc: David Thompson; Brian Barnes; Hosford, Elizabeth (CIV)
Subject: FW: Redacted Version of Fairholme Motion
Attachments: 04-24-15 Motion to De-Designate Priv Log (PROPOSED REDACTED VERSION).pdf

Gregg –

In accordance with Paragraph 11 of the Protective Order, we have prepared the attached proposed redacted version of the motion that we filed yesterday. Because we do not believe that the motion itself discloses Protected Information, the only change we have made (other than to the title and date of the filing) is the redaction of Exhibit D (the March 20 privilege log) in its entirety.

The attached document is password protected. I will send you the password in a separate email.

We would appreciate it if you could get back to us promptly with any additional proposed redactions.

Thanks very much

Vince

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