IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

JOINT STATUS REPORT

As directed in this Court's order of January 31, 2017 (ECF No. 354), the parties to this action respectfully submit this joint status report. The Court directed the parties to propose a schedule for the completion of discovery as well as a schedule for the completion of briefing on the United States' motion to dismiss.

I. Completion Of Jurisdictional Discovery

The parties have been unable to agree on a schedule for the completion of jurisdictional discovery.

A. Government's Position

No further discovery is necessary or warranted in advance of completion of briefing on the Government's motion to dismiss. On February 26, 2014, the Court authorized discovery on three issues in advance of adjudication of our motion to dismiss: (1) whether plaintiffs' claims are ripe for review when (a) future profitability is unknown and (b) the GSEs are still in conservatorship; and (2) whether FHFA "acted at the direct behest of the Treasury" when it entered into the Third Amendment; and (3) whether plaintiffs had a reasonable investment-backed expectation of the GSEs' future profitability. Order at 3, Feb. 26, 2014, ECF No. 32.

Consistent with the Court's order, we produced more than 48,000 documents, comprising over 500,000 pages, and plaintiffs deposed nine Government and GSE witnesses.

Jurisdictional discovery closed on December 31, 2015, as directed by the Court in its order dated September 4, 2015 (ECF No. 240). Since then, the Court and the Federal Circuit have adjudicated plaintiffs' motion to compel, which was fully resolved following the Court's January 31 order (ECF No. 353) implementing the Federal Circuit's decision in *In re United States*, No. 2017-1122, 2017 WL 406243 (Fed. Cir. Jan. 30, 2017). On February 2, 2017, we produced to plaintiffs the 48 documents referenced in the January 31 order. Consequently, discovery is complete, and no further discovery is warranted.

Nonetheless, plaintiffs, citing Federal Rule of Evidence 502(d), propose that the Court impose a "quick peek" procedure, wherein the plaintiffs would obtain unfettered access to the 11,000 documents on our privilege log; these are the documents the plaintiffs did *not* challenge in their December 2015 motion to compel. Rule 502(d), however, merely permits a court to issue an order stating that disclosure of a privileged document will not result in a waiver of privilege in the proceeding before the court or in subsequent actions. This Court has already entered such an order in this litigation. Second Amended Protective Order ¶ 13, ECF No. 256. We are not aware of any court that has applied Rule 502(d) to permit a party to sort through thousands of documents already identified as privileged.

A "quick peek" procedure is referenced in the advisory committee notes to the 2006 amendments to Rule 26(f) of the Federal Rules of Civil Procedure. Federal Rule 26(f) permits parties to *agree* to a procedure to allow the initial examination of documents without waiving privilege, and is typically used in cases involving the attorney/client privilege. We have advised the plaintiffs that the Government does not agree to the use of such an approach in this case.

Accordingly, the Court should reject the plaintiffs' request for open access to our privileged documents.

The "quick peek" process has its place in litigation when the parties jointly seek the procedure. When the party in possession of the documents rejects the approach, then "quick peek" becomes "quick forced waiver" - at least as far as the plaintiffs' access is concerned. The Court should reject *any* waiver that does not comply with the Federal Circuit's requirement that the Court review any document and make factual findings before undermining the Government's privilege claims. We are, moreover, aware of only one case, involving circumstances not present here, in which a court has ordered use of the "quick peek" procedure when the producing party had not agreed to do so. *See Summerville v. Moran*, 2016 WL 233627, at *6 (S.D. Ind. Jan. 20, 2016) (unpublished) (ordering "quick peek" of 12 documents only after court was unable to resolve motion to compel regarding applicability of attorney client privilege). Indeed, in the case cited by plaintiffs below, *Salem Financial v. United States*, 102 Fed. Cl. 793, 799-800 (2012), both parties were amenable to use of the "quick peek" procedure. The "quick peek" procedure should not be construed as a means to force a party to disclose the contents of thousands of privileged documents. A forced "quick peek" is particularly inappropriate in this case, given that governmental privileges are at issue and the harmful, chilling effect of disclosure will be realized even if privileged documents are disclosed solely to counsel.

Moreover, the procedure is intended to (1) minimize, at the outset of discovery, the expense and burden on a producing party faced with review of a large amount of electronically stored information, and (2) provide an opportunity for the receiving party to narrowly tailor its production requests. Rule 26(f) Advisory Notes. This is not a situation in which the parties seek to limit the scope of time-consuming privilege review at the outset of discovery. In this case, the

Government has (1) already devoted substantial time and great expense to reviewing hundreds of thousands of pages of documents responsive to plaintiffs' broad discovery requests, and (2) has determined that the documents on its privilege log are, in fact, subject to one or more privileges. Contrary to plaintiffs' suggestion otherwise, our privilege logs are comprehensive and the result of hundreds of hours of work. Given the monumental effort that has already been undertaken, plaintiffs' proposal is unreasonable. Review of all of the documents on our log will not, as they suggest, minimize the parties' burdens or "facilitate prompt and economical discovery by reducing delay." *Id.* To the contrary, plaintiffs contemplate ongoing "meet and confer" conferences, and, potentially, further motions practice that could continue indefinitely. Further, we are aware of no precedent supporting plaintiffs' suggestion that they should be permitted to review documents on our privilege log as a means to establish the need required to overcome the privileges we have asserted.

Indeed, plaintiffs' open-ended proposal to review our privileged documents, file additional motions to compel, and re-open or notice new depositions without a showing of need or that documents already produced are insufficient is wholly inappropriate given (1) that the Court has yet to resolve the threshold issue of whether it possesses jurisdiction to hear the complaint, and (2) the discovery rules limit parties to discovery proportional to the needs of the case. *Cf.* RCFC 1 (discovery rules should be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"); RCFC 26(b)(1) (parties may obtain non-privileged information "proportional to the needs of the case"); *Drone Technologies, Inc. v. Parrot S.A.*, 838 F.3d 1283, 1301 n.13 (Fed. Cir. 2016) (district court should have considered additional restrictions on discovery of highly-sensitive proprietary information, particularly "in light of the proportionality requirements

of Federal Rule 26(b)(2)(C)"). Given the extensive discovery plaintiffs have already received in advance of briefing on our motion to dismiss, additional discovery would be disproportionate and unwarranted.

Finally, plaintiffs have suggested, in correspondence with the Government, that their forced, wholesale waiver of the Government's privileges (with respect to plaintiffs) will somehow facilitate application of the Court's "teaching" in its ruling on the motion to compel. See February 17, 2016 e-mail from Brian Barnes to Elizabeth Hosford (attached as Exhibit A). Contrary to plaintiffs' contention, neither this Court nor the Federal Circuit suggested that the Government failed to apply properly the rules governing the assertion of governmental privileges. In fact, both this Court and the Federal Circuit largely accepted our legal arguments concerning the scope of the governmental privileges. Moreover, both courts acknowledged that consideration of a motion to compel discovery of material withheld for privilege requires analysis on a "document-by-document basis." *In re United States*, 2017 WL 40623, at *4; *see also* Sept. 20, 2016 Order at 30 ("Thus, *as to each document*, the court must be able to identify the affiliations of the individuals on defendant's privilege log and also discern the document's deliberative nature.") (emphasis added); *id.* at 25-26 n.14 (rejecting plaintiffs' argument that documents containing financial information or constituting forecasts are categorically outside the scope of the deliberative process privilege).

In their motion to compel, plaintiffs chose to present "only a small subset of the documents" that, they contended, the Government "may have improperly withheld for privilege," omitting thousands of other documents that the Government withheld. Plaintiffs' Motion to Compel Production of Certain Documents Withheld for Privilege at 4 n.2, Nov. 23, 2015, ECF No. 270. Plaintiffs' prior choice undermines plaintiffs' present contention that they should be

permitted to review the remainder of the documents on our log. Indeed, such access would result in the chilling of future Government communications and candid deliberations that the governmental privileges are intended to prevent. *In re United States*, 2017 WL 406243, at *5 (acknowledging that disclosure of Government deliberations may have a chilling effect on future speech regardless of whether a protective order is in place).

Accordingly, the Government proposes that the parties immediately resume the process of briefing the Government's motion to dismiss.[1]

B. Plaintiffs' Position

Plaintiffs' motion to compel identified a representative sample of the more than 11,000 documents the Government has withheld for privilege in this case. Of 54 documents Plaintiffs' motion identified that had been withheld under the deliberative process or bank examination privilege, the Government was ultimately ordered to produce 48 documents and voluntarily produced two others before this Court had an opportunity to rule on Plaintiffs' motion. It is clear from the resolution of Plaintiffs' motion that the Government relied on an improper and overbroad understanding of the deliberative process and bank examination privileges when it decided which documents to withhold. Under these circumstances, it is necessary to apply the principles set out in the ruling on Plaintiffs' motion to the remaining deliberative process and bank examination documents that appear on the Government's privilege logs.

The Government faults Plaintiffs because their motion to compel sought guidance from the Court by identifying a sample of documents for *in camera* review rather than individually

[1] In the event that the Court permits plaintiffs to file an additional motion to compel, as suggested below, the Government requests 30 days to respond to any such motion.

challenging *all* of the documents the Government may have improperly withheld. But the Government's privilege logs, which are vague and in at least some instances have proven to be inaccurate, made it impossible for Plaintiffs to identify every wrongfully withheld document. Moreover, the parties are perfectly capable of applying the Court's guidance to the remaining documents in dispute, and it was neither necessary nor practical for the Court to individually review more than a small subset of the documents that appear on the Government's privilege logs. If accepted, the Government's argument would effectively give producing parties unreviewable discretion to assert privilege over all but a handful of documents in cases that involve large volumes of discovery material.

Plaintiffs believe that it would be appropriate for the Court to use the "quick peek" procedure authorized by Federal Rule of Evidence 502(d) to resolve the parties' remaining document privilege disputes. *See Salem Fin., Inc. v. United States*, 102 Fed. Cl. 793, 800 (2012); *see also, e.g.*, *Summerville v. Moran*, 2016 WL 233627, at *6 (S.D. Ind. Jan. 20, 2016). Under that procedure, the Court would issue an order under which the Government would be directed to permit Plaintiffs' counsel to review the remaining deliberative process and bank examination documents on its privilege logs without waiving any claims of privilege.[2] Plaintiffs' counsel would then identify the subset of documents on the Government's privilege logs that are most relevant to this case and that Plaintiffs' counsel believes should be produced in light of the ruling on the motion to compel. Any remaining document privilege disputes would then narrowly focus on the subset of documents identified by Plaintiffs' counsel. Despite the Government's

[2] The Government fundamentally misunderstands the quick peek procedure when it argues that this procedure would force it to "waive" its privilege claims. *See Salem Fin. Inc.*, 102 Fed. Cl. at 800 ("In providing the documents for the Government's review, Plaintiff does not waive any privilege or protection it has asserted previously in this case.").

suggestion that the quick peek procedure is only appropriate if used at the outset of discovery, 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). Furthermore, the Government's refusal to consent to this procedure cannot in any way limit the scope of this Court's authority to issue discovery orders authorized by the Federal Rules, and the Government acknowledges that the court in *Summerville* ordered the use of the quick peek procedure over a producing party's objections. *Summerville*, 2016 WL 233627, at *6; *see also Rajala v. McGuire Woods, LLP*, 2010 WL 2949582, at *5 (D. Kan. July 22, 2010) (concluding that Federal Rules authorized clawback order even though not all parties agreed).

Plaintiffs submit that the quick peek procedure is the most efficient mechanism for resolving the parties' remaining privilege disputes. In reviewing the deliberative process and bank examination documents on the Government's privilege logs, Plaintiffs' counsel would target only those documents most relevant to this litigation; to the extent the Government has withheld documents that are only tangentially relevant, Plaintiffs would not seek their production. The quick peek procedure is also especially appropriate given the ruling that Plaintiffs' need overcame the Government's qualified deliberative process and bank examination privileges with respect to more than 90% of the sample of documents Plaintiffs identified. The Government has never suggested that it produced *any* documents because Plaintiffs' need overcame its qualified privileges. In light of the Government's unwillingness to extend the Court's ruling to the remaining documents it has withheld and its failure to propose any workable alternative to the quick peek procedure, the Court should order that the parties use that procedure to resolve their remaining document privilege disputes.

Accordingly, Plaintiffs propose that the remaining discovery in this case should proceed as follows:

1. To resolve the remaining document privilege disputes in this case, the parties will use the "quick peek" procedure authorized by Federal Rule of Evidence 502(d). *See Salem Fin., Inc. v. United States*, 102 Fed. Cl. 793, 800 (2012). To that end, by February 28, 2017, the parties will jointly submit a proposed order that this Court could issue under which the Government would allow Plaintiffs' counsel to review the remaining deliberative process and bank examination documents on its privilege logs without waiving any claims of privilege. Within 45 days of being permitted access to those documents, Plaintiffs' counsel will identify the subset of documents that are most relevant to this case and that Plaintiffs' counsel believes should be produced in light of the ruling on Plaintiffs' motion to compel. The parties will then informally work to resolve any remaining disagreements over the Government's claims of privilege over the specific documents identified by Plaintiffs' counsel.

2. To the extent the parties are unable to resolve any remaining document privilege disputes, Plaintiffs will file a motion to compel with respect to the remaining disputes within 30 days of the deadline for identifying documents on the Government's privilege logs. The Government's response to any such motion will be due within 14 days of when the motion is filed, with Plaintiffs' reply brief due within 7 days of the filing of the Government's response.

3. Within 10 days of the resolution of the remaining document privilege disputes, Plaintiffs will inform the Government whether they intend to reopen or notice any additional depositions in light of the resolution of the motion to compel and the completion of document discovery.

II. Motion To Dismiss Briefing[3]

The parties jointly propose the following briefing schedule:

1. Within 45 days of the final resolution of the parties' discovery disputes, Plaintiffs in this and the related cases may file amended complaint(s).

2. Defendant will file an Omnibus Motion to Dismiss seeking dismissal of this and all related actions before this Court no later than 120 days after the expiration of the period for filing the amended complaint(s).

3. Plaintiffs in this case will file their response to the Government's Omnibus Motion to Dismiss no later than 90 days following the filing of the Omnibus Motion to Dismiss, and plaintiffs in each of the related cases will be permitted to file their own separate response to Defendant's motion also within 90 days following the filing of the Omnibus Motion to Dismiss.

4. Defendant will file a reply in support of its Omnibus Motion to Dismiss no later than 90 days following the filing of response(s) to the Omnibus Motion to Dismiss in this and related cases.

[3] The related actions are: *Washington Federal, et al. v. United States* (No. 13-385C); *Cacciapalle, et al. v. United States* (No. 13-466C); *Fisher, et al. v. United States* (No. 13-608C); *Arrowood Indemnity Co., et al., v. United States* (No. 13-698C); *Reid et al. v. United States* (No. 14-152C); *Rafter et al. v. United States* (No. 14-740C). The parties to this action have not, to date, consulted with all of the plaintiffs in the related cases, but the schedule suggested above is designed to accommodate briefing in all of the cases in a manner that will achieve efficiency and reduce the volume of briefing that would be necessary were the Government required to respond separately to each complaint. The process by which the Court may provide other parties an opportunity to respond to this joint proposal could be in the form of an order to show cause why this approach should not be adopted.

Date: February 24, 2017

Respectfully submitted,

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EXHIBIT A

Hosford, Elizabeth (CIV)

From: Brian Barnes <BBarnes@cooperkirk.com>
Sent: Friday, February 17, 2017 8:29 AM
To: Hosford, Elizabeth (CIV)
Cc: Bezak, Reta E. (CIV); Schiavetti, Anthony F. (CIV)
Subject: RE: Fairholme - status report due on 2/21
Attachments: 2-17-17 Fairholme Proposed JSR on Future Proceedings.docx

Hi Liz,

We think it's necessary to apply the teaching of the ruling on our motion to compel to the remaining documents the Government has withheld for privilege. (I note that the Government was ultimately ordered to produce 48 of the 52 documents challenged that were not withheld under the Presidential Communications Privilege.) We also think that resolution of our motion to compel may make it appropriate to reopen previous depositions in which Government counsel directed witnesses not to answer questions on the basis of claims of privilege and believe that the rules entitle us to take a tenth deposition.

I've attached a draft JSR that reflects how we propose the case should proceed. Please let me know if the Government is willing to reconsider its position, but otherwise I think it will be necessary for us to file a JSR that outlines the parties' competing views and proposals.

Best regards,

Brian W. Barnes
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From: Hosford, Elizabeth (CIV) [mailto:Elizabeth.Hosford@usdoj.gov]
Sent: Wednesday, February 15, 2017 4:56 PM
To: Brian Barnes <BBarnes@cooperkirk.com>
Cc: Bezak, Reta E. (CIV) <Reta.E.Bezak@usdoj.gov>; Schiavetti, Anthony F. (CIV) <Anthony.F.Schiavetti@usdoj.gov>
Subject: Fairholme - status report due on 2/21

Brian – I'm writing to touch base about the joint status report that is due on Tuesday, February 21. Given that discovery has concluded, we would suggest that the parties file a report proposing a schedule for briefing the motions to dismiss that is consistent with the schedule we outlined in the status report filed in January 2016 (attached).

Thanks.

Liz

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