

# In the United States Court of Federal Claims

No. 13-465C  
(Filed: November 9, 2017)

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 FAIRHOLME FUNDS, INC. et al., \*  
 \*  
 Plaintiffs, \*  
 \*  
 v. \*  
 \*  
 THE UNITED STATES, \*  
 \*  
 Defendant. \*  
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## ORDER

On October 4, 2017, the Court issued an Order directing the parties to engage in a quick peek procedure. The parties have submitted a joint motion in which they propose a process for conducting the quick peek procedure. For good cause shown, the following is hereby **ORDERED**:

1. Initial Review

Defendant shall make available at its place of business, 1100 L Street NW, Washington, DC 20005, the documents dated May 1, 2012, or later, that appear on defendant's privilege logs as being withheld, in whole or in part, solely on the basis of the deliberative process privilege and/or the bank examination privilege. This Order does not cover documents withheld under other claims of privilege.

2. Non-Waiver

Pursuant to Federal Rule of Evidence 502(d), production under paragraph one of this Order shall not waive the deliberative process privilege, the bank examination privilege, or any other privilege claimed in this case, for purposes of this proceeding or any other federal or state proceeding.

3. Plaintiffs' Review

Counsel for plaintiffs in the above-captioned case, Fairholme Funds, Inc., et al. (plaintiffs' counsel), shall complete a review of the documents within 21 days. The review shall be conducted as follows:

a. Review Platform

Defendant shall load the documents onto a hard drive in a secure room. Plaintiffs shall restrict access to the hard drive to three of plaintiffs' counsel who must be admitted under the Protective Order issued in this case.

b. No Copying

Except as permitted or required by paragraphs 3(c), 3(e), 5, and 6 below, plaintiffs' counsel shall not print, copy, email, record, replicate, imprint, transmit, or otherwise reproduce the documents in whole or in part, whether by electronic, automatic, or manual means. Plaintiffs' counsel shall not permit any other individual or entity to print, copy, email, record, replicate, imprint, transmit, or otherwise reproduce the documents in whole or in part, whether by electronic, automatic, or manual means. The three attorneys conducting the review shall not share the contents of the documents with any individual or entity other than (i) other counsel for Fairholme Funds, Inc., et al., who have been admitted under the Protective Order, (ii) defendant's counsel, or (iii) the Court.

c. Notes To Be Sequestered

Plaintiffs' counsel may take notes regarding plaintiffs' continued challenge of defendant's deliberative process or bank examination claims with respect to the documents. But plaintiffs' counsel shall sequester any such notes and may use them only for purposes of (i) conducting the review of the documents, (ii) preparing a list of documents pursuant to paragraph 3(e), (iii) discussing or preparing to discuss the documents with defendant (see paragraph 5 below), or (iv) seeking or preparing to seek the Court's further guidance regarding the documents (see paragraph 6 below).

d. Deletion

Following the resolution of all issues concerning the documents, whether by agreement (see paragraphs 4 and 5 below) or by the Court's further Order (see paragraph 6 below), plaintiffs' counsel shall delete or destroy all notes discussing the documents or parts thereof.

e. List to Defendant

Within 7 days of the completion of the review, plaintiffs' counsel shall provide defendant with a list of documents or parts of documents it believes should be produced (i) because the documents or parts of documents are not protected by the deliberative process or bank examination privileges or (ii) because plaintiffs' need for the particular documents or parts of documents outweighs defendant's need for non-disclosure of those documents or parts of documents.

4. Defendant's Review

Defendant's counsel shall review the list provided to them pursuant to Sub-para. 3(e), above, and, within 21 days of its receipt, shall provide plaintiffs with a list of the documents or parts of documents from plaintiffs' list that defendant continues to believe it is entitled to withhold (the "remaining documents"). Defendant shall produce to plaintiffs all other documents from plaintiffs' list.

5. Informal Consultation

The parties shall confer, either in person or telephonically, to discuss the remaining documents. The parties shall attempt in good faith to resolve their differences regarding those documents without the Court's intervention and, to the extent the parties agree that particular remaining documents or parts thereof should be produced, defendant shall produce those remaining documents or parts thereof. The parties shall complete informal consultation under this paragraph within 10 days of the Government's production of documents under paragraph 4.

6. Further Court Involvement

If the parties are unable to resolve their differences regarding any of the remaining documents being withheld by defendant on privilege grounds, plaintiffs may file a motion to compel production any of the remaining documents that plaintiffs choose within 7 days of completion of the informal consultation discussed in paragraph 5.

7. Further Challenges by Plaintiffs

Plaintiffs shall not make any further challenges to documents or parts of documents, other than those addressed in the provisions of paragraphs 5 or 6 above, until the Court has resolved defendant's motion to dismiss.

**IT IS SO ORDERED.**

s/ Margaret M. Sweeney  
MARGARET M. SWEENEY  
Judge