IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S
MOTION FOR EXTENSION OF TIME

Defendant was given 24 days to explain why it should not be ordered to pay Plaintiffs' expenses in preparing a motion to compel that this Court granted "in its entirety." Opinion & Order at 80 (Sept. 20, 2016), Doc. 340. That allotment of time was generous. This Court's rules generally require parties to respond to electronically-served motions within 17 days, *see* RCFC 7.2(a)(1); RCFC 6(d), and the matters that Defendant's filing must address are not complex. The Rules create "[a] rebuttable presumption . . . in favor of imposing expense shifting sanctions" where, as here, a motion to compel is granted in full. *Canvs Corp. v. United States*, 104 Fed. Cl. 727, 732 (2012); RCFC 37(a)(5). And the Court's ruling that *all 56* of the documents submitted for *in camera* review must be produced makes plain that Defendant's position was not substantially justified. Briefing this matter requires nothing more than the straightforward application of established legal rules to uncontested facts, and no further delay is appropriate.

Perhaps more importantly, Defendant's request only serves to underscore its continuing failure to comply with this Court's Opinion and Order. In the more than three weeks that have passed since the Court granted Plaintiffs' motion to compel, Defendant has not produced a single

one of the documents it was ordered to produce.[1] Plaintiffs initially agreed to Defendant's request for additional time to review the Court's order and assess its options, but after taking that additional time, Defendant now says that before complying with the order, it needs still more time. But the only avenue Defendant could conceivably pursue in seeking relief from the Court's order would be to petition the Federal Circuit for a writ of mandamus—"an extraordinary remedy appropriate only in exceptional circumstances, such as those amounting to a judicial 'usurpation of power' or a clear abuse of discretion." *In re TC Heartland LLC*, 821 F.3d 1338, 1341 (Fed. Cir. 2016). The writ will not normally issue to disturb a lower court's evidentiary privilege ruling except in cases that present "an important issue of first impression," the immediate resolution of which "would avoid the development of doctrine that would undermine the privilege." *In re Seagate Tech., LLC*, 497 F.3d 1360, 1367 (Fed. Cir. 2007) (en banc). This Court's meticulous, 80-page opinion breaks little new doctrinal ground but instead carefully applies settled legal principles to particular documents in light of the specific facts of this case. As Defendant is no doubt aware, such applications of established law are poor candidates for mandamus review.

Regardless, any suggestion that Defendant needs more time to decide whether to seek mandamus rings hollow. A review of the dockets in the handful of cases in which the United States has petitioned the Federal Circuit for mandamus in recent years reveals numerous instances in which it was able to decide on a legal strategy and file its petition in less than one month. *See, e.g.*, *In re United States*, 542 F. App'x 944 (Fed. Cir. 2013) (mandamus petition

[1] Nor has Defendant provided any indication to Plaintiffs that it intends to revisit, in light of the Court's rejection of its privilege arguments as to every document specifically discussed in the Court's opinion, its decision to withhold thousands of other responsive documents on the basis of the exact same arguments.

filed 19 days after lower court ruling); *In re United States*, 590 F.3d 1305 (Fed. Cir. 2009) (mandamus petition filed 29 days after lower court ruling); *In re United States*, 463 F.3d 1328 (Fed. Cir. 2006) (mandamus petition filed 21 days after lower court ruling). The Department of Justice's internal processes did not prevent Defendant from moving forward in a matter of a few weeks in those cases, and Defendant has offered no explanation for why those same processes pose a greater obstacle here.

Plaintiffs have already suffered serious harm from Defendant's decision to improperly withhold documents that should have been produced years ago, and they will suffer even more serious prejudice if Defendant is allowed to continue to postpone its compliance with this Court's order. In this Court, Plaintiffs cannot complete discovery or further prosecute their case until Defendant complies with the Court's order. Plaintiffs are threatened with even greater prejudice with respect to their parallel suit pending before the D.C. Circuit. That court's historical practice suggests that a ruling is likely to issue soon, and Plaintiffs could be deprived of the opportunity to bring additional relevant documents to its attention if Defendant is permitted to spend the next several weeks contemplating its legal strategy. This Court previously refused to follow a course that would have "undermine[d]" the ability of the D.C. Circuit appellants "to fully prosecute their case," Order Granting Motion to De-Designate Seven Documents at 4 (Apr. 13, 2016), Doc. 313, and it should do so again here. Defendant's motion should be denied, and Defendant should be directed to promptly comply with the Court's order.

Date: October 13, 2016

Respectfully submitted,

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