

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

EMERGENCY MOTION FOR ENFORCEMENT OF COURT ORDER

Plaintiffs move that the Court direct Defendant to produce by noon on Thursday, October 27, any documents that this Court ordered Defendant to produce following *in camera* review and that Defendant does not intend to raise with the Federal Circuit. In support of this motion, Plaintiffs state as follows:

1. Since September 20, 2016, when this Court granted Plaintiffs’ motion to compel with respect to all 56 documents that it reviewed *in camera*, Defendant has repeatedly delayed complying with this Court’s order. On September 29, 2016, Defendant requested, and Plaintiffs agreed, to allow Defendant an additional 10 days to consider whether to seek further review of the Court’s decision. After that time had expired on Tuesday, October 11, Defendant granted itself a further extension over Plaintiffs’ objection until Friday, October 21. On October 21, Defendant informed Plaintiffs that it would not comply with the Court’s order until at least Tuesday, October 25. With those further extensions having now expired, Defendant today informed Plaintiffs that it intends to seek further review of the Court’s decision “in a matter of days.” When asked whether Defendant would seek further review with respect to *all* of the documents the Court ordered produced, counsel for Defendant said that she was “not at liberty to say at this time.” Counsel for Defendant further stated that she was unable to represent whether

Defendant has made a final decision about whether to challenge all aspects of the Court's ruling and could not commit to seeking further review by any specified date.

2. The D.C. Circuit issues its published opinions on Tuesdays and Fridays, and a ruling in Plaintiffs' parallel Administrative Procedure Act suit before that court is expected imminently.¹ Defendant's continued pattern of delay threatens to cause Plaintiffs serious prejudice by making it impossible for Plaintiffs to bring additional relevant documents to the attention of the D.C. Circuit—even documents that this Court ordered produced and that Defendant has decided to produce without appeal to the Federal Circuit.

3. While Plaintiffs did not begrudge Defendant a reasonable time to review the Court's decision, it is apparent that Defendant has now settled on a legal strategy but is unwilling to disclose that strategy to the extent that doing so would require it to produce documents prior to the D.C. Circuit's anticipated ruling. If Defendant has made a final decision that it will not seek appellate review with respect to some of the documents this Court ordered it to produce, there is no excuse for Defendant's failure to produce those documents immediately. Further delaying the production of those documents would cause Plaintiffs serious and unjustifiable harm.

4. For these reasons, the Court should direct Defendants by noon on Thursday, October 27, to either represent that it intends to seek further review with respect to *all 56* of the documents this Court reviewed *in camera* and ordered produced or else to produce those documents that it will not raise with the Federal Circuit. Such relief would appropriately balance Defendant's need for time to prepare papers for the Federal Circuit against Plaintiffs' pressing

¹ The appeal was argued over six months ago, and the D.C. Circuit already has decided the overwhelming majority, by our account well over 95%, of the cases heard last term.

need for relevant, non-privileged documents they may wish to bring to the attention of the D.C. Circuit.

Date: October 25, 2016

Respectfully submitted,

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