IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

FAIRHOLME FUNDS, INC., THE FAIRHOLME FUND, ACADIA INSURANCE COMPANY, ADMIRAL INDEMNITY COMPANY, ADMIRAL INSURANCE COMPANY, BERKLEY INSURANCE COMPANY, BERKLEY REGIONAL INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, MIDWEST EMPLOYERS CASUALTY INSURANCE COMPANY, NAUTILUS INSURANCE COMPANY, PREFERRED EMPLOYERS INSURANCE COMPANY, Plaintiffs-Appellees v. UNITED STATES, Defendant-Appellant.	No. 17-1122 (Fed. Cl. No. 13-465C)

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS APPEAL OR FOR SUMMARY AFFIRMANCE

The Government's response to Plaintiffs' motion does not present a colorable argument that this Court has jurisdiction under the collateral order doctrine to hear this appeal. Instead, all the Government can muster is citation to two cases in which this Court heard interlocutory appeals "involving decisions that threatened to require disclosure of sensitive information." Opposition to Plaintiffs' Motion to Dismiss

Appeal or, in the Alternative, for Summary Affirmance at 2–3 (Dec. 1, 2016), Doc. 16 ("Opp."). But the collateral order doctrine plainly does not extend to all such cases; the Supreme Court squarely held in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), that a trial court's order directing the disclosure of material allegedly covered by the attorney-client privilege is not subject to immediate appeal. Plaintiffs' motion discussed *Mohawk* at length, yet the Government's response makes no attempt to distinguish it or to respond to any of Plaintiffs' other arguments. As the party invoking this Court's appellate jurisdiction, it is the Government's burden to show that this appeal may go forward. *Raley v. Hyundai Motor Co.*, 642 F.3d 1271, 1275 (10th Cir. 2011); *Reinholdson v. Minnesota*, 346 F.3d 847, 849 (8th Cir. 2003); *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 289 (5th Cir. 2000); *see also Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). The Government has utterly failed to carry its burden.

Plaintiffs explained in their motion that the Court cannot hear this appeal under the collateral order doctrine for two independent reasons. First, trial court rulings reviewed under the collateral order doctrine must be "completely separate from the merits of the action," *Competitive Techs., Inc. v. Fujitsu Ltd.*, 374 F.3d 1098, 1102 (Fed. Cir. 2004) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)), and at bottom the Government's appeal asks the Court to overturn the trial court's determination that particular documents are highly relevant to the

substantive issues presented in this case. As the Supreme Court has explained, the collateral order doctrine does not authorize immediate appellate review of discovery rulings that involve "inquir[ing] into the importance of the information sought." *Cunningham v. Hamilton Cty.*, 527 U.S. 198, 205 (1999).

Second, appellate review under the collateral order doctrine is limited to issues that would be "effectively unreviewable on appeal from a final judgment," *Competitive Technologies*, 374 F.3d at 1102 (quoting *Coopers & Lybrand*, 437 U.S. at 468), and this Court can resolve the parties' privilege disputes after the trial court rules on the merits of Plaintiffs' claims, *see Mohawk*, 558 U.S. at 109. Litigation over qualified governmental privileges is routine in the Court of Federal Claims, yet the Government is unable to cite *any* case in which this or any other appellate court has held that as a party the Government may immediately appeal from an adverse privilege ruling.

The cases the Government cites are not to the contrary. *Apple Inc. v. Samsung Electronics Co.*, 727 F.3d 1214, 1218, 1220 (Fed. Cir. 2013), was an appeal from a trial court order requiring the *public* disclosure of certain confidential information at the request of a third-party intervenor—a ruling that had no bearing on the merits of the parties' underlying dispute and that the Court could not have reviewed via appeal from final judgment. Similarly, *Kaplan v. Conyers*, 733 F.3d 1148, 1153–54 (Fed. Cir. 2013) (en banc), concerned the scope of the Merit Systems Protection Board's

authority to overturn adverse employment decisions based on national security considerations. Whether the Board had the power to hear the claims at issue was a question completely separate from the merits, and the purpose of the relevant limits on the Board's authority was to protect the Government from being required to defend against such suits in the first place. *See Berry v. Conyers*, 435 F. App'x 943 (Fed. Cir. 2011), *upheld sub nom. Kaplan v. Conyers*, 733 F.3d at 1153; *cf. Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (trial court's rejection of qualified immunity subject to immediate appeal under collateral order doctrine because "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability" and this entitlement "is effectively lost if a case is erroneously permitted to go to trial"); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144–45 (1993) (similar with respect to sovereign immunity). The Government's reliance on cases so far afield only underscores the dearth of authority supporting appellate jurisdiction.

Unable to rebut the arguments in Plaintiffs' motion, the Government proposes that the Court should "defer consideration" of the motion "until its ruling on the pending petition for a writ of mandamus." Opp. at 3–4. With the Court having now received full briefing on both Plaintiffs' motion to dismiss and the Government's mandamus petition, Plaintiffs agree that the most efficient course is for the Court to dispose of both matters in a single ruling. That is the approach the Ninth Circuit took

in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2009)—a case in which the parties submitted a single round of briefing covering both the mandamus petition and the related appeal. Because the briefs already submitted gave both sides in this case a full and fair opportunity to be heard on both the jurisdictional and merits issues that this appeal presents, Plaintiffs believe that no further briefing on this appeal is necessary or appropriate.

Date: December 7, 2016

Respectfully submitted,

/s/ Charles J. Cooper

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2016, I caused a copy of the foregoing Plaintiffs' Reply in Support of Their Motion to Dismiss to be filed electronically via the Court's CM/ECF system. This filing was served electronically on Appellant the United States by the Court's electronic filing system.

/s/ Charles J. Cooper
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