

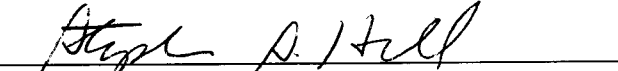
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:00CVO2445
)	Judge Robertson
ANN VENEMAN, Secretary of the)	
United States Department of Agriculture)	
)	
Defendant.)	

PLAINTIFFS' CORRECTED MOTION FOR EXPENSES

Pursuant to the Court's Order of January 20, 2004, and Fed. R. Civ. Pr. 37(a)(4), plaintiffs hereby move for an order requiring defendant or her counsel to pay reasonable expenses, including reasonable attorneys' fees, incurred in connection with Plaintiffs' Motion To Compel Production of Certain Allegedly Privileged Documents And For In Camera Inspection of Allegedly Privileged Documents. A supporting Memorandum of Points And Authorities accompanies this motion.

Respectfully Submitted,



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Date: February 4, 2004

- The government's invocation of the deliberative process privilege has not been waived, but neither has it been properly invoked.
- The government's invocation of the attorney-client privilege and attorney work product protection for documents whose authors are unknown is improper.
- Documents withheld on claims of privilege that were not set forth in the privilege log were improperly withheld.
- The government's inadvertent production of privileged documents waived the privilege as to those documents, but not generally as to the entire attorney-client privilege in the case.

Id. at 1-2.

After ordering "that plaintiffs' motion to compel be granted," the Court stated that it would "entertain a motion pursuant to Fed. R. Civ. P. 37(a)(4) for plaintiffs' reasonable expenses incurred in making their motion, including attorneys fees." Id. at 2. (Emphasis in original.) The Court further ordered that, "on February 6, 2004 at 10:00 a.m., defendant produce for in camera inspection every document responsive to plaintiffs' discovery requests that defendant continues to withhold from production after reviewing the principles set forth above." Id. (Emphasis in original.)

Fed. R. Civ. P. 37(a)(4), in pertinent part, provides that:

If the motion [to compel] is granted or if the . . . requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain . . . discovery without court action, or the opposing party's nondisclosure or objection was substantially justified or that other circumstances make the award of expenses unjust.

Fed. R. Civ. P. 37(a)(4). The first requirement of Fed. R. Civ. P. 37(a)(4) is satisfied by the Court's having granted plaintiffs' motion to compel. Thus, unless one or more of the three exceptions to the rule applies, plaintiffs are clearly entitled to recover their expenses. As we now show, none of the exceptions apply to the instant case.

As set forth more fully in Plaintiffs' Motion to Compel, plaintiffs made a good faith effort to resolve the dispute over the privilege log without court action. Indeed, the effort began with plaintiffs' letter of July 14, 2003 setting forth the deficiencies in defendant's discovery responses including, inter alia, the failure to produce a privilege log with the objections. See July 14, 2003 letter from Stephen S. Hill to Lisa Olson, Esq. at 4-5 ("Clearly, to the extent that any . . . documents are in fact being withheld, defendant is required to produce a log of such documents and a description of these documents sufficient to test the validity of any privilege claims.") (Ex. 2 to Plaintiffs' Motion to Compel.) Plaintiffs followed that letter with another letter on July 29, 2003 requesting once again that defendant produce a privilege log. (Ex. 1 to this Motion.) That letter prompted a reply from defendant indicating that the privilege log would be provided by August 8, 2003.

On August 11, 2003, defendant finally produced the privilege log, which consisted of 108 pages and the listed approximately 887 documents. Plaintiffs carefully reviewed the privilege log and compared it to the documents that had been produced. In the course of that review, it became apparent that a substantial number of documents were being withheld on very dubious grounds. This concern was expressed to defendant in a letter dated September 11, 2003 from Stephen S. Hill to Lisa Olson, Esq. (Ex. 3 to Plaintiffs' Motion to Compel.) In that letter, plaintiffs advised defendant, inter alia, of the well-settled case law in this circuit indicating that defendant waived any alleged privilege "which may have attached [to] the documents" inadvertently produced. Id. at 1. In addition, plaintiffs advised defendant of their position that "defendant's offer to disclose materials that she contends are covered by the deliberative process privilege . . . indicates that defendant is unable to sustain her burden of demonstrating that the documents in question are, in fact, protected by that privilege."¹ Id. At that point, had defendant

¹ In the weeks preceding that letter plaintiff undertook to determine if it would be possible to resolve the issue with respect to the documents withheld on the basis of the deliberative process and indeed all privileged documents without burdening the Court. The parties, however, were unable to agree on such a procedure and plaintiffs were unwilling to permit defendant to selectively invoke the deliberative process privilege and took the position that defendant's willingness to waive the privilege claim with respect to certain documents meant that defendant could not sustain the privilege with respect to these documents.

undertaken even a cursory review of the relevant case law, she would have discovered, if she did not already know, the well-settled proper procedure for invoking the deliberative process privilege.

In addition, in that same letter, plaintiffs noted that “our careful review of the privilege log and ongoing review of the documents lead us to believe that defendant has indiscriminately and improperly asserted privilege claims,” and that defendant had done so to an extent that “calls into question the validity of all of defendant’s privilege claims.” Id. at 1. Consequently, plaintiffs formally invoked the objection procedure set forth in the Protective Order entered by the Court on May 8 2003. Under that procedure, defendant was afforded an opportunity to review her privilege claims and either withdraw such claims or seek a protective order. See May 8, 2003 Protective Order, ¶ 3.

On that same day, defendants responded and rejected out of hand plaintiffs’ invocation of the formal objection procedure, noting that “[t]he only aspect of your letter that merits a response is your assertion that a party’s inadvertent disclosure of . . . privileged documents . . . effects a waiver of the privilege(s) in question.” Letter from Lisa Olson, Esq. to Stephen S. Hill dated September 11, 2003 (Ex. 4 to Plaintiffs’ Motion to Compel). (Emphasis added.) Notwithstanding defendant’s response, plaintiffs still sought to afford defendant an opportunity to reconsider her privilege claims. In addressing directly the foregoing quote, plaintiffs asked: “Should we take from the second sentence of your [September 11,2003] letter that plaintiffs need not wait until 5:00 p.m. Tuesday [September 16, 2003] to file their motion to compel?” Letter from Stephen S. Hill to Lisa Olson, Esq., September 12, 2003. (Ex. 5 to Plaintiffs’ Motion to Compel.) Moreover, as plaintiffs pointed out in response to defendant’s September 11, 2003 letter, “the purpose of our September 11, 2003 letter was, among other things, to afford defendant the opportunity to review what [plaintiffs] consider to be ill-considered privilege claims and thereby to avoid the need for further litigation and the imposition of any additional burden on the court.” Id.

Rather than follow the procedure prescribed in the May 8, 2003 Protective Order and reconsider her privilege claims, defendant instead, on September 12, 2003, submitted a revised privilege log which, while adding and deleting certain documents, largely suffered from the same flaws that characterized the original privilege log. The revised privilege log consisted of 110 pages rather than the 108 pages that comprised the original privilege log and purported to list approximately 889 documents as opposed to the approximately 887 listed in the original privilege log. Thus, it was difficult to determine what documents, or in some instances, what portions of documents had been added or deleted in creating the new privilege log. Consequently, plaintiffs were required to undertake a detailed, line-by-line comparison of the two privilege logs and the document numbers from both logs to determine the differences between the two logs. This additional effort added considerably to both the time and cost of the Motion to Compel.

As for the second exception set forth in Fed. R. Civ. P. 37(a)(4), defendant cannot show that the failure to produce the withheld documents was justified. First, with respect to the hundreds of documents withheld on the basis of the deliberative process privilege, defendant had to know or, with a minimum of research, should have known the well-settled procedure for invoking that privilege. There is absolutely nothing to suggest the defendant ever intended to take the steps necessary to properly invoke that privilege. Similarly, defendant should have known that it was improper to invoke the attorney-client privilege and attorney work product protection for documents whose authors are unknown. By the same token, given the well-settled state of the law, defendant should have known that “[d]ocuments withheld in a claim of privilege that were not set forth in the privilege log were improperly held.” Finally, given the well-settled state of the law in this circuit with respect to the waiver of privilege resulting from inadvertent disclosure, it is inconceivable that defendant’s continued adherence to her position that the disclosure did not create a waiver was in any way justified, much less “substantially justified. . . .” Indeed, any doubt concerning the justifiability of defendant’s nondisclosure and objection should be eliminated by the fact that to date defendant has failed to produce a single

document “after reviewing the principles set forth” in the Court’s January 20, 2004 Order. Indeed, today defendant renewed her “offer” to selectively assert the deliberative process privilege. (See Ex. 2 to this Memorandum.)

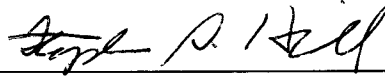
As for the third exception, there do not appear to be any “other circumstances [that] make an award of expenses unjust. Certainly, plaintiffs are not aware of any such circumstances. Thus, plaintiffs are clearly entitled to recover their reasonable expenses in connection with Plaintiff’s Motion to Compel.

Based upon a review of plaintiffs’ time records, these expense amount to \$37,564.08. That amount represents a total of 82.9 hours of attorney time at billing rates ranging from \$120 to \$455 per hour and 13 hours of paralegal time (C.L. Fiorina) at a billing rate of \$195 per hour. A detailed description of the work performed is set forth in Ex. 3 attached hereto. In addition to the foregoing attorneys fees, research services (*i.e.* Lexis and Westlaw) and miscellaneous (velobinding) charges in the amounts of \$695.75 and \$11.00 respectively are also included. All these charges are set forth in Ex. 3.

CONCLUSION

For the foregoing reasons, plaintiffs request that defendant and/or her counsel be required to pay plaintiffs the sum of \$37,564.08 as plaintiffs’ reasonable expenses, including attorneys’ fees, incurred in connection with Plaintiffs’ Motion to Compel (plaintiffs take no position with respect to whether defendant and/or her counsel should be required to pay plaintiffs’ expenses).

Respectfully Submitted,



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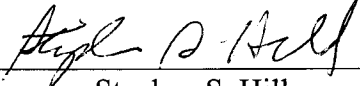
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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2004 Plaintiffs' Motion For Expenses and the accompanying Memorandum Of Points And Authority In Support Of Plaintiffs' Motion For Expenses was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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Stephen S. Hill